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Our constitutional unsettlement

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Abstract

This paper argues that the United Kingdom is now in a state of constitutional unsettlement. A state of constitutional unsettlement is not, first, a settled constitution, nor is it, secondly, an unsettled constitution, nor thirdly, is it a written Constitutional settlement. Yet all of these other conditions are significant in placing the circumstances of constitutional unsettlement in historical and comparative relief. The UK used to have something like a settled constitution, though it meant, and continues to mean, very different things to different people; we then, quite recently, moved into the phase of an unsettled constitution, but one whose terminus has offered neither a return to a settled constitution nor arrival at a new – and for the UK unprecedented, documentary Constitutional settlement. Instead, the unsettled constitution has become normalized - or at least regularized - as a state of constitutional unsettlement, in which questions of EU membership, of devolution and independence, of human rights protection etc, are subject to continuous disputation with deeply uncertain long-term consequences, regardless of how they may be resolved in the present tense. There is much to be concerned with in our state of constitutional unsettlement. Nevertheless, the very idea of a condition of constitutional unsettlement need not be considered in principle and inevitably pathological. Rather, as a state of affairs that is be in the process of becoming more and more embedded in contemporary public life and less and less capable of wholesale or even measured undoing or transformation, then, short of fatalistic acceptance, we may have no option but to look for the positives. And, having done so, we may find in certain virtues of transparency, the primacy of the political, fluidity and adaptability of outcome, and less exclusive conceptions of constitutional identity, more positives than might have been anticipated.

Keywords

British constitution; European Union; Scottish independence; human rights; written Constitution; unwritten constitution

Our constitutional unsettlement¹

1. An Unsettling Story

The aim of this contribution is to capture something both distinctive and prognostic about the constitutional phase and situation in which we find ourselves in the United Kingdom today. I describe this as a state of constitutional unsettlement.

What is meant by this how has it come about, and how might it develop? In trying to answer these questions, the argument will run from negative to positive. It will do so in two respects. First, as a matter of definition, we begin to trace the outline of the condition of constitutional unsettlement from the outside, so to speak, by specifying and explaining what that condition does *not* consist of, either because our constitution has never been that way or because it may once have been that way but is so no longer. Only then, by a process of elimination, will we be in position to specify what is meant by constitutional unsettlement in more positive terms. Secondly, the concluding part of our discussion will also move from negative to positive in evaluative terms. A constitutional *unsettlement* may not sound like something we should be particularly sanguine about. And, it shall be argued, there is indeed much to be concerned with in our state of constitutional unsettlement. Nevertheless, the very idea of a condition of constitutional unsettlement need not be considered in principle and inevitably pathological. Rather, as a state of affairs that is be in the process of becoming more and more embedded in contemporary public life and less and less capable of wholesale or even measured undoing or transformation, then, short of fatalistic acceptance, we may have no option but to look for the positives. And, having done so, we may find more positives than we might have anticipated.

But first we turn to the description and explanation of what is meant and what is not meant by constitutional unsettlement, and how we have arrived at such a state. What constitutional unsettlement is not, as we shall see, is reflected in some clear distinctions in wording, or at least in the order of words. A state of constitutional unsettlement is not, first, a *settled constitution*, nor is it, secondly, an *unsettled constitution*, nor thirdly, is it a *Constitutional settlement*. Yet all of these other conditions are significant in placing the circumstances of constitutional unsettlement in historical and comparative relief. In a nutshell, we used to have something like a settled constitution, though it meant, and continues to mean, very different things to different people; we

¹ This text is based upon the annual *Public Law* Lecture given at Queen Mary College, University of London in December 2012. My thanks are due to the School of Law and to the editors of *Public Law* for being such splendid hosts on that occasion.

then, quite recently, moved into the phase of an unsettled constitution, but one whose terminus has offered neither a return to a settled constitution nor arrival at a new – and for the UK unprecedented, documentary Constitutional settlement. Instead, the unsettled constitution has become normalized - or at least regularized - as a state of constitutional unsettlement.

Let us look at these various stages in turn.

2. The settled constitution

We begin with the settled and the unsettled constitution. The term unsettled constitution has emerged in recent years to account for what one writer has described as "a prolonged moment of constitutional fluidity".² We will shortly examine what this entails, but, first, what of the implicit contrast with an earlier state of settled constitutionalism?

What is meant by the settled constitution? The very idea that Britain ever did have a settled constitution is of course a matter of some controversy. But I want to pin down at least a modest sense in which that is true and is broadly considered to be so, as it is vital to the set of contrasts that I want to draw. My prompt is provided by Vernon Bogdanor in his 2009 book *The New British Constitution*.³ There he argued that the "old constitution"⁴ comprised both a distinctive dynamic - the evolutionary course of adaptive development so vividly portrayed by Walter Bagehot,⁵ and a distinctive doctrine - the sovereignty of Parliament, famously canonized by Dicey as the keystone of our constitution.⁶ The basic fit between the two is clear, indeed symbiotic. The persistence of the doctrine that Parliament can make or unmake any law and that no other entity can override or set aside parliamentary legislation - since it solidified as the pre-eminent norm of the constitution over the course of the 17th century - is at one and the same time *expression*, *consequence*, and *reinforcing cause* of an evolutionary constitutional order.

The sovereignty of Parliament is, first, a clear expression and vehicle of an evolutionary constitutional logic. In holding that the Crown-in-Parliament always retains the last (or rather, latest) legislative word both against its own previous authority and against any and all other sources of law and claims to legal authority, the doctrine treats any and all laws as subject to change by

² Evidence of Adam Tomkins, cited in House of Commons European Scrutiny Committee; "The EU Bill and Parliamentary sovereignty" 10th Report (2010-11) para. 24 (An unsettled constitution) see also P Norton "The Unsettled British Constitution" *Politics Review* Sep 1st 2006; A. King "Does the United Kingdom still have a Constitution? (London: Sweet and Maxwell, 2001).

³ (Oxford: Hart, 2009)

⁴ *Ibid* ch.2.

⁵ *The English Constitution* (Oxford: OUP, 2009) [First published 1867].

⁶ A.V. Dicey *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan, 1885).

ordinary legislative process and so facilitates an incremental approach to the reform of the content of the constitution. Parliament is competent at any time, and absent any decisive external legal constraint, to amend the rules concerning the entire range of constitutional matters, from the composition, role and overall pattern of the institutions of government to the relations between government and citizens. The persistence of parliamentary sovereignty is also, secondly, one consequence of an evolutionary constitutional order. The deep continuities of modern British political history – the relative absence of the ruptures of conquest, of political revolution, or of territorial fracture or realignment directly affecting the metropolitan centre,⁷ has meant that, once established against the courts and the executive, there has been little occasion – neither clear opportunity nor irresistible pressure – to depart from the doctrine of the legislative supremacy of the central institutional complex of the British state.

Parliamentary sovereignty, thirdly, provides reinforcement for the evolutionary constitution. It does so in two senses, symbolic and instrumental. Symbolically, parliamentary sovereignty long supplied an object of continued affirmation and embedded identification within our political culture. It helped to dignify the very notion of evolution – of constitutional gradualism – treating this as the dividend of a flexible and responsive centralism based upon a proud and venerable institution rather than as a matter of cumulative historical accident and rudderless drift. In addition, parliamentary sovereignty supplied the anchor for the broader notion of an unwritten British constitution, allowing this to be portrayed as superior to the practice of documentary constitutionalism rather than an apologetic second best. From the 1780s onwards, indeed, in response to events unfolding across the Channel and the Atlantic, ‘Paper constitution’ emerged as a term of ridicule, and precisely the United Kingdom’s “*lack of a written constitution [came] to serve a distinguishing and celebratory function*”⁸ for many generations of defenders of our constitutional faith.⁹

⁷ On the history of relative inattention at the English centre of British constitutional thought and practice to the lessons of constitutional flux and the examples of constitutional difference at the Celtic edges and in the colonial beyond, see e.g. C. Bell “Constitutional Transitions: The Peculiarities of the British Constitution and the Politics of Comparison” [2014] *Public Law* forthcoming; see also C. McCrudden, “Northern Ireland and the British Constitution since the Belfast Agreement” in J. Jowell and D. Oliver (eds) *The Changing Constitution* (Oxford: OUP, 6th edition, 2007) 227–270. Despite the palpable centrality of the Irish question to British constitutional politics in recent years, it seems that this attitude persists. For example, prefacing an otherwise comprehensive, insightful and highly readable recent book-length analysis of the British Constitution, Anthony King has this to say: “I have said... almost nothing about Northern Ireland. That is not because I am not interested in Northern Ireland or because I believe that the province is unimportant. It is simply because the politics and the constitution of Northern Ireland are oddly detached from those of the rest of the United Kingdom... What happens in Northern Ireland scarcely affects British constitutional development; constitutional development in Britain scarcely affects what happens in Northern Ireland... To have added a Northern Ireland dimension ... would have greatly lengthened the book and ... made parts of it incredibly complicated... In addition, events in Northern Ireland sometimes proceed at such a pace that it is impossible for the outsider to keep up.” *The British Constitution* (Oxford: OUP, 2007) ix. Apart from the highly questionable hypothesis about the absence of mutual causality, the citation of difference, complexity and the speed and urgency of changes at the inner margins of the UK constitution as reasons to *ignore* (rather than to pay special attention to) these changes reflects the persistence of a narrowly metropolitan constitutional mindset.

⁸ Linda Colley *Acts of Union and Disunion* (London: Profile Book, 2014) 140.

Instrumentally, not only was parliamentary sovereignty a vehicle of gradual adaptation of the content of the constitution, but it was *itself* also a gradually adapted and adaptable vehicle. No extraordinary or plainly discontinuous assertion of constitutional authority was required to adjust the constitution to new times and circumstances, but merely the latest and so normatively continuous assertion of a supple legislative sovereignty doctrine. Through procedures and conventions that adjusted the composition of Parliament and the manner and form of its law-making from time to time, the doctrine of parliamentary sovereignty proved pliable enough to allow continuity and adaptation, or at least the appearance of continuity and adaptation, in situations where the structure, role or reach of the very institution - Parliament - to which the doctrine referred was at stake, and where a more rigid doctrine would have provoked rupture. In the case of Union with Scotland in 1707, for example, according to the dominant constitutional understanding, though with intermittent protests from Scottish political culture and constitutional thought,¹⁰ the sovereignty of the Westminster Parliament merely continued and the new was 'incorporated into' and absorbed by the old.¹¹ Similarly, the initiation of the great democratic revolution of Parliament in the Reform Act in 1832, or towards the end of that journey, the move to limit the competence of the undemocratic Lords to frustrate the will of the democratic house in the Parliament Acts (1911 and 49), both promised structural reform of Parliament and its internal relations without disturbing the basic concept and status of parliamentary sovereignty.

We should not, of course, overstate the extent to which the fit between parliamentary sovereignty and an evolutionary process has made for a settled constitution. If we think of a constitution as performing three basic sets of normative functions,¹² the respects in which the UK unwritten constitution, with parliamentary sovereignty as its centrepiece, was ever settled, are in truth strictly limited. And, importantly, these limited aspects of settlement are closely linked to the low level of resolution we find in other aspects of the constitution. These three sets of normative functions are first, *authorisation*, secondly, *institutionalisation* and thirdly, the expression and sponsorship of a basic *philosophy and set of principles of government*.¹³ In a nutshell, the settled part of the UK constitution has concerned authorisation, and to a limited degree institutionalisation, but far less does it extend to substantive philosophy and principles of government.

⁹ Including, famously, both Bagehot (note 5) and Dicey (note 6).

¹⁰ Grown louder and more insistent in the 20th century, and an important bridging resource for the sovereigntist claims that underpin arguments for Scottish independence; see e.g. N. Walker, "Beyond the Unitary Conception of the United Kingdom Constitution" [2000] *Public Law* 384.

¹¹ See in particular A. V. Dicey and R. S. Rait *Thoughts on the Union between England and Scotland* (London: Macmillan, 1920) esp ch.4 ; for discussion, see N. MacCormick *Questioning Sovereignty* (Oxford: OUP, 1999) ch4 ; C. Kidd *Union and Unionisms: Political Thought in Scotland, 1500-2000* (Cambridge: CUP, 2008).

¹² See e.g., D. Grimm "Integration by Constitution" (2005) 4 *International Journal of Constitutional Law* 193-208.

¹³ See e.g., J. Raz, "On The Authority and Interpretation of Constitutions: Some Preliminaries" in L. Alexander (ed) *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) 152 – 193, 153.

Parliamentary sovereignty is first and foremost a principle of legal authorisation. It lacks the dexterity for the detailed division and intricate layering of authority one finds in the terms of a canonical constitutional text, but nonetheless it is just as final and comprehensive in scope as such a textual authorisation. It both supplies a fundamental rule of recognition¹⁴ - telling judges and other officials what they should treat as the law of the land, and provides a jurisgenerative precept - a deep source of law-making. Parliamentary sovereignty, also, if more generally and less determinatively, necessarily implies the centrality of Parliament to the institutional architecture of the state. And in so supplying the doctrinal basis for the "Parliamentary state"¹⁵, it has two major structural effects. First, the doctrine of parliamentary sovereignty has the consequence of decisively empowering whoever could control Parliament, namely the executive; in particular, from the early 18th century the political or ministerial executive under the prime minister. Secondly, it consigns the judiciary to a position where, however important in other respects, they lack the ultimate authority to review the legality of parliamentary legislation.

Yet the very stability of parliamentary sovereignty as an authorising rule and as an anchoring institutional design, by dint of its empowerment of the executive over the legislature and its refusal of any legal limit upon *what* these political organs of the constitution can do - as opposed to *how* they may properly do it - has also worked against a settled constitution in terms of substantive philosophy and principles of government. There is, and there can be, for example, no equivalent to the eternity clauses we find in written constitutions, as in the German endorsement of the 'social state',¹⁶ or the French guarantee of a republican form of government,¹⁷ or the United States' federalism-entrenching commitment to equality of representation of the states in the Senate.¹⁸ More broadly, the lack of a written constitution as an alternative and wider seat of sovereignty, with its preambulatory statement of purpose and aspiration, its holistic normative design, its crystallisation and commemoration of a process of conscious and often widely participatory collective self-determination, and its continuing status as a totem of popular sovereignty and a point of textual reference for a trans-generational conversation about self-government,¹⁹ entails that many of the prompts for the elaboration of a common framework philosophy of government have simply not been available in the British case.

¹⁴ On the complex relationship between the doctrine of parliamentary sovereignty and the Hartian idea of a 'rule of recognition', see A.L. Young, 'Sovereignty: Demise, Afterlife, or Partial Resurrection?' (2011) 9 *International Journal of Constitutional Law* 163-175.

¹⁵ D. Judge *The Parliamentary State* (London: Sage, 1993)

¹⁶ German Basic Law, Article 20 para 1

¹⁷ French Constitution, Article 89

¹⁸ United States Constitution, Article V.

¹⁹ See e.g., Grimm, *op cit* note 12

This is not to deny, of course, that certain wider and deeper ideas of good government do nevertheless inform and infuse the British constitution beyond a bare commitment to parliamentary sovereignty and its necessary incidents. But the permissiveness of the parliamentary sovereignty doctrine means that these animating ideas remain controversial in theory and contested in practice. Some, whether John Griffiths, in his famously plangent utterance that “the constitution is no more and no less than what happens”,²⁰ or David Marquand with his rather more colourful description of the constitution as a “Palimpsest of sometimes discordant myths, understandings and expectations, reflecting the changing values of succeeding generations”²¹ seek to underline the extent to which formal continuity enables substantive discontinuity. Such readings of the constitution occupy no single clear position, but an indistinct spectrum of possibilities.²² They may embrace, on the one hand, a kind of realism in which the absence of a legal authority that constrains as well as enables political power casts the constitution as an arena of raw political competition. And on the other hand, they may embrace a more normatively committed stance which makes a virtue of the constitutional prominence of political institutions and the affirmation of representative democracy and strong political accountability this implies in the modern state,²³ even if these institutions were born in a pre-democratic age.

Other readings of the constitution, typically taking their historical cue from Dicey,²⁴ look to other legal sources and sensibilities deeply ingrained in our culture of government to moderate or to displace the primacy of the political. They look to the Rule of Law, much dependent on common law rules against arbitrary power and in defence of basic liberties as applied by a politically independent judiciary. They look also to the influence of constitutional conventions in smoothing the rougher edges of political power, both oiling the wheels and checking the excesses of executive government. Together these factors are deemed to have supplied a substantive counterpoint to the destabilising potential of parliamentary sovereignty.²⁵

It is not easy to reconcile such diverse positions, but in one sense closely relevant to our immediate purpose we are able to do so. For, on both sides of the historical narrative, the settled

²⁰ J Griffiths “The Political Constitution” (1979) 42 MLR 1, at 19.

²¹ “Pluralism v Populism” (1999) 42 *Prospect* 27 A palimpsest is a manuscript on which two or more successive texts have been written, each erased to make room for the next

²² On the contested meaning and significance of the ‘political constitution,’ both in the seminal work of Griffiths (note 20) and as a plausible and normatively attractive account of the British constitution more generally, see e.g., M. Loughlin “Modernism in British public law, 1919-79” *Public Law* (2014) pp.56-67 ; A. Tomkins *Our Republican Constitution* (Oxford : Hart, 2005) ; G. Gee and G. Webber, “What is a political constitution?” (2010) 30 *Oxford Journal of Legal Studies*, 926-949 ; M. Goldoni “Two Internal Critiques of Political Constitutionalism ” (2012) 10 *International Journal of Constitutional Law* 926-949.

²³ See e.g. Tomkins *op. cit* n22 ; R. Bellamy *Political Constitutionalism* (Cambridge : CUP, 2007_ chs 4-6; K. Ewing, “The Resilience of the Political Constitution” (2013) 14 *German Law Journal* 2111-2136

²⁴ *Op cit*, note 6.

²⁵ See e.g. J. Jowell and D. Oliver, “Editors’ Introduction” in J. Jowell and D. Oliver *The Changing Constitution* (Oxford: OUP, 7th edition, 2011) 1-6.

character of the constitution was indicated by the absence of a propensity to pursue profound or wholesale constitutional transformation. One side, emphasising what is sometimes called the 'political constitution',²⁶ has tended to be *instrumentalist* in outlook.²⁷ It is marked by a recognition of the resilient thinness of the constitution of parliamentary sovereignty, but with the emphasis on thinness and on an appreciation of the opportunity this gave for a "functionalist"²⁸ approach to law as the vehicle of political rule. The other side, emphasising what is sometimes called the 'legal constitution', has tended to be more *traditionalist*.²⁹ Likewise, there is recognition of the resilient thinness of a constitution long tethered to the doctrine of parliamentary sovereignty, but here with the emphasis on the achievement and the vital additional ingredients of resilience; in particular a culture of respect for the long accumulation of practice and the prominence of various means (common law, conventions) and voices (judges, peers, monarchy, civil service) of stability. In both approaches, reform in the evolutionary constitution is never holistic, but gradual, piecemeal and typically unsystematic, either by dint of a lack of interest in the constitution except as a tool or resource for the furtherance of a political programme or, conversely, due to a conservative reverence, or the display of a conservative reverence, for its deep tenets. Neither by intensity nor scope of ambition is there a challenge to the very foundations of the order.

We should be under no illusions that the difficulties of analysis of the settled constitution remain profound. How do we measure degrees of continuity in the *longue durée* of a uniquely 'long' constitution? How, if at all, do we periodize across such a vast historical expanse of the unwritten constitution, both pre-and post-parliamentary sovereignty? What even counts as constitutionally relevant in an arrangement that, in its narrow preoccupation with authoritative foundations, fails to name or integrate what is constitutional or clearly differentiate between what is constitutional and what is not? With which, if any, other constitutions of the world could intelligent comparison be made in assessing the relative settlement of the British constitution?

Fortunately, we need not attempt to answer these larger questions here. We need merely focus on the contemporary disturbance of these narrow areas where, as we have observed, there is a common or overlapping sense of the constitution as displaying a historically settled character; as regards authoritative foundations and, to some extent, institutional focus, together with the common pragmatism of traditionalism and instrumentalism. And we need to show why and how the new unsettled constitution has departed from that norm.

²⁶ Griffiths, *op cit* note 20

²⁷ See e.g. Bellamy *op. cit.* note 23; Ewing *op. cit.* note 23.

²⁸ See M. Loughlin *Public Law and Political Theory* (Oxford: OUP, 1992); "The functionalist style in public law" 55 *University of Toronto law Journal*, 361-403.

²⁹ Alec Walen, *Judicial Review in Review: A Four-Part Defense of Legal Constitutionalism*, (2009) 7 *International Journal of Constitutional Law* 329; Tom Hickman, *In Defence of the Legal Constitution*, (2005) 55 *Univ. Toronto L.J.* 981; see also Bellamy, *op. cit.* note 23, chs 1-3.

3. The unsettled constitution

Here, as with the long reign of the settled constitution, the story lines are familiar. Indeed, the basic narrative is more broadly affirmed, its key themes less divisive than in the case of the unsettled constitution. Crucially, however, the ending remains very much unresolved.

The message is one of a slow burn of reform, followed by a marked increase in the constitutional temperature - a coming to the boil, usually associated with Tony Blair's New Labour government in 1997 though continuing beyond its demise to the Brown administration and the present Coalition.³⁰ It is a tale of parallel lines of challenge, both to parliamentary sovereignty as an authoritative legal doctrine and to the institutional centralism of the parliamentary state. The assault comes from many quarters. It comes from the rival legal supremacy claim of an ever more juridically assertive and jurisdictionally encroaching European Union,³¹ from entrenchment, albeit in weak form, of the Human Rights Act³² as the domestic interface of another key transnational regime – the Council of Europe's Convention on Human Rights, and from the legally and politically diverse array of autonomy claims from supporters of self-government in Ireland³³ and, progressively, in Scotland,³⁴ and, if in a somewhat lesser key, Wales.³⁵ It comes from serial efforts,³⁶ of diminishing effectiveness,³⁷ to reduce and abolish the aristocratic component of the House of Lords. It comes from other attempts, more or less successful, to rebalance and redistribute power at the centre of the Parliamentary state, through freedom of information,³⁸ closer control over Parliamentary standards³⁹ and electoral reform.⁴⁰ It comes from attempts to bolster the independence and rationalise the expertise of the judicial branch of the constitution, whether through the location of a new Supreme Court outside the Palace of Westminster⁴¹ or the

³⁰ See e.g. V. Bogdanor *The Coalition and the Constitution* (Oxford: Hart, 2011).

³¹ See e.g. *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1992] 1 AC 603 ; and now, *R (HS2Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC

³² Human Rights Act 1998, esp. ss 3, 4 and 6.

³³ Northern Ireland Acts, 1998-2009.

³⁴ Scotland Acts, 1998-2012.

³⁵ Government of Wales Acts, 1998-2011.

³⁶ See esp. House of Lords Act 1999.

³⁷ On the failure of the House of Lords Reform Bill 2012, which would have established a mainly elected second chamber, see N. Barber "House of Lords Reform: A look in the long grass" UK Constitutional Law Association Blog (2012) <http://ukconstitutionallaw.org/2012/07/12/nick-barber-house-of-lords-reform-a-look-in-the-long-grass/>

³⁸ Freedom of Information Act 2000; see also P. Birkinshaw "Regulating Information" in J. Jowell and D. Oliver *op. cit.* note 25, 365-393.

³⁹ See e.g. P. Leopold, "Standards of Conduct in Public Life" in Jowell and Oliver, *op cit* note 25 394-418.

⁴⁰ On the failure of the Alternative Vote referendum in 2011, see P. Whitely, H. Clarke, D. Sanders and M. Stewart, "Britain says NO; voting in the AV Referendum" http://www.exeter.ac.uk/media/universityofexeter/research/microsites/epop/papers/Whiteley,_Clarke,_Sanders,_and_Stewart_-_Britain_Says_NO.pdf

⁴¹ Constitutional Reform Act 2005, Part 3.

introduction of a new Upper Tribunal at the apex of an (at least partly) integrated system of administrative justice.⁴²

All of these factors have combined to make the constitution more multipolar in its sources of authority and less institutionally concentrated. What is more, the process is one that is cumulative without being 'joined-up', progressive without being planned. Just as parliamentary sovereignty and the evolutionary constitution fed off each other, so too the erosion of parliamentary sovereignty and declining investment in the settled constitution and in a gradualist approach to its development are mutually suggestive and reinforcing trends. There are a number of different elements to this dynamic, each pushing in the same direction.

In part this is a matter of legal doctrine. Once the absoluteness of parliamentary sovereignty is tested, it becomes progressively easier to chip away at its armour. Consider the line of key cases of recent years where the meaning and extent of the basic doctrine has been at issue, from *Factortame*⁴³ to *Thoburn*,⁴⁴ from *Jackson*⁴⁵ to *Axa*⁴⁶ and now to the *HS2* case.⁴⁷ While these challenges have met with only modest success, the tools of critique have been sharpened. The sheer diversity of claims from very different areas of our constitution, from the countervailing authority of the European Union,⁴⁸ to the 'Parliamentary' standing of a devolved legislature⁴⁹ to the very jurisdiction of the courts as a check on the internal rules and processes of Parliament,⁵⁰ creates a richly diverse resource of critical legal opinion. And crucially, the special character of the doctrine of parliamentary sovereignty renders it peculiarly susceptible to the accumulation of critical reason. For parliamentary sovereignty used to be treated as axiomatic, as the platform on which constitutional reason stood and so as itself before and *beyond* reason. Once parliamentary sovereignty is seen as challengeable, its citadel in principle capable of being breached, then it must in turn be defended through reason where once it was matter of unassailable faith. There is a deal of difference, actual and latent, between a doctrine that is viewed as the unimpeachable top rule and

⁴² Tribunals, Courts and Enforcement Act 2007, Part 1.

⁴³ *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1992] 1 AC 603

⁴⁴ *Thoburn v. Sunderland City Council* [2003] Q.B. 151

⁴⁵ *R (Jackson) v Attorney General*, [2006 1 AC 262](#) (UKHL 2006).

⁴⁶ *AXA General Insurance v Lord Advocate* [2011] UKSC 46.

⁴⁷ *R (HS2Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

⁴⁸ Declaration no 17 annexed to the Lisbon Treaty, OJ 200 8, C 115/ 344 (Declaration Concerning Primacy); see also *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1992] 1 AC 603; *Thoburn v. Sunderland City Council* [2003] Q.B. 151; *R (HS2Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

⁴⁹ *AXA General Insurance v Lord Advocate* [2011] UKSC 46

⁵⁰ *R (Jackson) v Attorney General*, [2006 1 AC 262](#) (UKHL 2006); *R (HS2Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3

one whose superiority must forthwith be argued for and weighed in the same or similar fashion to other deep principles of the constitution.⁵¹

The unsettling of the constitution is also, more prosaically, a matter of the logic of political consequentialism. It is a story of spillover and unintended consequences, of domino effects and the multiple adjustments provoked by the disturbance of any embedded system. There are many examples of this type of causal connection. The crafting of the new Supreme Court was in part inspired by concerns over the standing of the House of Lords, technically part of the legislature, as an impartial guarantor of a fair trial under Article 6 of the ECHR, as incorporated by the Human Rights Act.⁵² Repeated and growing concerns about the ability of the Westminster government and Parliament to represent specifically English concerns and aspirations fully and fairly have been fuelled by the development of devolved Parliaments with significant legal competence in territories that nevertheless continue to send significant numbers of MPs to London to vote on questions that affect English voters but no longer those in their native constituencies.⁵³ Agitation for reform of the House of Lords as a legislative chamber is motivated not only by basic democratic concerns, but also by the prospect of some kind of regionally sensitive upper chamber for a gradually dispersing, quasi-federal United Kingdom.⁵⁴ And to take but one more, and highly topical case, the viability and popularity of plans for sub-state autonomy in the Celtic nations, most immediately in the Scottish independence debate, are intimately linked to the fact and terms of continuing supra-state membership. In crude terms, the plausibility of a new level of sovereign autonomy *below* the British state is widely seen to depend in not insignificant part upon the conditions of participation in a regime which claims a portion of sovereignty rights *above* the level of the state.⁵⁵

These political and doctrinal considerations have fed into and fed off a broader cultural shift in attitudes to our constitutional situation. In part this is a matter of 'high' academic and political culture. Over half a century there has been a progressive intensification of debate over the "changing constitution"⁵⁶ and how it might be addressed. The settled constitution was something whose virtue was not only unwritten, but often unseen and unspoken, and simply taken for granted

⁵¹ See e.g. Lord. Hope of Craighead "Is the Rule of Law now the Sovereign Principle?" in R. Rawlings, P. Leyland and A.L. Young (eds) *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford: OUP, 2013) 89-97.

⁵² *Constitutional Reform: A Supreme Court for the United Kingdom*. Department of Constitutional Affairs. CP 11/03 July 2003 para 3.

⁵³ In the Scottish context, famously known as the 'West Lothian Question'; for recent consideration, see Report of the Commission on the consequences of devolution for the House Of Commons (McKay Commission) March 2013 http://webarchive.nationalarchives.gov.uk/20130403030652/http://tmc.independent.gov.uk/wp-content/uploads/2013/03/The-McKay-Commission_Main-Report_25-March-20131.pdf

⁵⁴ See. E.g., the proposals for regional representation in the coalition's abortive proposals for Lords' reform; HM Government *House of Lords Reform Draft Bill* May 2011, Cm 8077.

⁵⁵ Compare HM Government (2013), *Scotland Analysis: Devolution and the Implications of Independence*, Cm 8554, with Scottish Government (2013), *Scotland in the European Union*.

⁵⁶ Jowell and Oliver *op cit* note 25.

by establishment elites; indeed, it was a constitutional form whose virtue, whether from an instrumentalist or a traditionalist perspective, lay partly in the fact that it *could be* taken for granted. Today, tacit affirmation has been replaced by a more explicit and more sharply differentiating form of position-taking and defending. For example, recent positions such as common law constitutionalism,⁵⁷ constitutional pluralism,⁵⁸ and the increasingly stylised contemporary reconstructions of political and legal constitutionalism,⁵⁹ connect the worlds of academic and professional elites and seek either to feed directly into the doctrinal bloodstream, or at least to provide alternative interpretations of our constitutional heritage and its implications for current development. More generally, a busy industry of detailed constitutional analysis and monitoring has grown up,⁶⁰ and this broader enterprise connects to a new political interest and, to some extent, a popular interest in "generative" rather than "programme" politics.⁶¹ In part this feeds off the many particulars of the reform agenda, and in part it flows from and back into a more general sense of anxiety and disillusionment with the political process.⁶²

Finally, these various tendencies are also connected with broader changes in the transnational and trans-state environment. Not only have the EU and the ECHR been important post-war catalysts for constitutional transformation and reflection, but these and other contemporary challenge to the *external* sovereignty of the state, from the growth of 'world order'⁶³ Treaty organisations such as the United Nations and the International Criminal Court to the development of many new forms of private or hybrid regulation beyond the state, provide a permanently altered backdrop for our domestic constitutional debate⁶⁴ Parliamentary sovereignty no longer supplies a mark and guarantor of closely aligned internal and external legal and political capacity.⁶⁵ Internal authority is no longer sufficiently capacious or closely integrated to supply a secure platform for unqualified title in international relations; equally, unqualified international title no longer exists to justify exhaustive internal capacity. Rather the intensified encroachment of international actors upon what was once a domestic monopoly and the greater disaggregation and dispersal of the domestic

⁵⁷ See e.g. T. Poole, *Back to the Future: Unearthing the Theory of Common Law Constitutionalism* (2003) 23 *Oxford Journal of Legal Studies* 435-454

⁵⁸ see e.g. N. Walker, "The Idea of Constitutional Pluralism" (2002) 65 *Modern Law Review* 217-259; see also M. Avbelj and J. Komarek (eds) *Constitutional Pluralism in Europe and Beyond* (Oxford: Hart, 2012).

⁵⁹ See references at notes 20-29 above.

⁶⁰ See in particular the wide-ranging work of the Constitution Unit based at University College, London since its establishment in 1995. <http://constitution-unit.com/about/>

⁶¹ D. Miliband "Introduction" in D. Miliband (ed) *Reinventing the Left* (Cambridge: Polity, 1994)

⁶² See e.g. Bogdanor, *op. cit.* note 3, ch.2.

⁶³ See e.g. E. De Wet "The Constitutionalisation of Public International Law" in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1224.

⁶⁴ See e.g. N. Walker, "Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders" 6 *International Journal of Constitutional Law* 373 (2008) at 373-396

⁶⁵ See e.g. N. Walker, "Sovereignty Frames and Sovereignty Claims" in Rawlings, Leyland and Young (eds), *op. cit.* note 51, 18-33.

branches of government across transnational regime-building and decision-making – most obviously and immediately but by no means exclusively in the context of the EU⁶⁶ - serves to blur the boundaries between internal and external domains and to provide a new and fluid menu of possibilities for constitutional change.

4. Beyond the unsettled constitution

If this combination of doctrinal, political, cultural and geopolitical factors helps accounts for the unsettled constitution, can it also account for where the unsettled constitution might lead? Here the trail of argument becomes more complex, the possible pathways divergent.

In the first place, some have viewed the unsettled constitution, at least implicitly, as an extended episode - as a phase with a beginning and an end. A particular conjuncture of forces reached a tipping point of intensity under a New Labour government attuned to the dynamics described above and unprecedented in its apparent willingness to embrace constitutional reform as a systematic programme. However, it was always a programme of finite purpose and limited aspiration, and a combination of initial achievement and a less auspicious political climate for structural change might suggest that the natural lifespan of the project is over or at least drawing to a close, and that the constitution, now somewhat transformed, is ready to 'settle down' again.⁶⁷

Another perspective, shading into and sometimes difficult to distinguish from the first, views the new phase as perhaps more than a temporary episode but still less than a disjunctive change. Instead, it is viewed as embodying a new state of dynamic constitutional equilibrium, one characterised by a steadily continuing commitment to reform. The history of Jeffrey Jowell and Dawn Oliver's influential text, *The Changing Constitution*, is highly instructive in this regard. The first edition in 1985 was an explicit tribute to the incrementalism of Britain's settled constitution. Published to mark the one hundredth anniversary of Dicey's *The Law of the Constitution*, it cautioned that the slow evolution of practice meant that, a century on, Dicey, though still important, could no longer be seen as a full or reliable guide to constitutional practice.⁶⁸ The presumed need for the publication of a seventh edition of Jowell and Oliver a mere quarter of a century on in 2011 is itself a mark not only of the remorselessness of incremental change, but also

⁶⁶ All the major institutions of the EU – Commission, European Council, Council, Parliament, Central Bank and Court of Justice – operate directly upon national legislative, executive or judicial processes and decisions. Equally, each of the constitutional branches of the UK government – Parliament, executive and judiciary – are closely involved in EU processes and decisions. See more generally, N. Walker, "Independence in an Interdependent World" in G. Hassan and J. Mitchell (eds) *After Independence* (Edinburgh: Luath, 2013) 21-34.

⁶⁷ See e.g. A. King, *op. cit.* note 7, 353, 365

⁶⁸ Oxford: OUP, 1985; see editors' preface

of its "quickenning pace".⁶⁹ The increased momentum of the New Labour years is explicitly noted, but this is woven into an analysis that sees a diet of reform towards "renewal but not perfection"⁷⁰ as the new normal state.

A third perspective treats the period of the unsettled constitution as a prelude to and preparation for a new Constitutional settlement. From Lord Hailsham in 1976 railing against the "elective dictatorship"⁷¹ of contemporary executive-dominated and ideologically committed Party government to the Institute of Public Policy's draft Constitution of 1991,⁷² and from Gordon Brown's *Governance of Britain* Green Paper in 2007,⁷³ to the very recent deliberations of the Political and Constitutional Reform Committee of the House of Commons,⁷⁴ many - even where they have fallen short of a full endorsement of a textual initiative - have been prepared to contemplate the period of the unsettled constitution as facilitating, necessitating or otherwise foreshadowing a more formal or deliberate Constitutional settlement.

None of these three answers, however, is convincing. The episodic approach would struggle to explain the extent to which the reform agenda has continued, and in significant respects even accelerated, after the New Labour years. Alongside renewed attempts at the reform of the House of Lords and the electoral system, we have witnessed serious contemplation of reform of domestic human rights commitments made under the 1998 Act,⁷⁵ mooted in the shadow of protracted reconsideration of Britain's international commitments under the ECHR.⁷⁶ We have also seen, first, a new intent to impose a referendum check on any extension of EU powers in the European Union Act 2011,⁷⁷ and, more recently, the more radical step of a commitment by the Conservative Party - the dominant party in the present Coalition, if re-elected, to hold an 'in-out' referendum on continued EU membership in 2017 after a period of attempted renegotiation and reduction of the present scope of European integration.⁷⁸ And in the area of regional autonomy, we have seen

⁶⁹ "Editors' Introduction" *op. cit.* note 25, 1.

⁷⁰ *Ibid*

⁷¹ "Elective dictatorship". *The Listener*: 21 October 1976, 496-500.

⁷² *The Constitution of the United Kingdom* (London: IPPR, 1991).

⁷³ Cm 7170, para. 212.

⁷⁴ *Do we need a constitutional convention for the UK?* (2013) HC 371; See also *Government Response to the House of Commons Political and Constitutional Reform Committee Fourth Report of Session 2012-13* Cm 8749.

⁷⁵ Commission on a Bill of Rights *A UK Bill of Rights? The choice before us* December 2012

<http://www.justice.gov.uk/about/cbr>

⁷⁶ See in particular, High Level Conference on the Future of the European Court of Human Rights *Brighton Declaration* April 2012 http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

⁷⁷ Ss 2,3 and 6. See further, P. Craig, "The United Kingdom, The European Union and Sovereignty" in Rawlings, Leyland and Young (eds), *op. cit.* note 51, 165-185.

⁷⁸ For the full text of David Cameron's EU speech at Bloomberg, see *The Guardian* 23rd January 2013

<http://www.theguardian.com/politics/2013/jan/23/david-cameron-eu-speech-referendum>

accelerated moves towards greater dispersal of powers. The Silk Commission⁷⁹ has reinforced the momentum towards a fuller system of legislative and fiscal devolution in Wales set in place by the 1998 and 2006 Acts and already enhanced by the 2011 referendum, while a referendum on Scottish independence, notwithstanding the insertion of increased legislative and tax-raising powers, post-Calman Commission⁸⁰ in the Scotland Act 2012,⁸¹ looms as a pivotal constitutional moment in September of this year.

This catalogue of activity also serves to indicate that the alternative idea of a new equilibrium committed to ongoing constitutional adjustment betrays a similar tendency to understate the pace and unpredictability of change. Many meditations on the present state of the constitution, especially from the metropolitan centre, see in the accelerated pace of change an even greater need to rely upon the unwritten constitution's historical flexibility. We observe that in Jowell and Oliver's account, for example,⁸² and also in Anthony King's recent affirmation of the abiding virtues of our Eton-style constitutional "mess."⁸³ However, as our analysis of the four intertwined dynamics of change already indicated, the idea that such an intensity and diversity of change can be absorbed by the normal adaptability of the unwritten constitution is highly questionable. Rather, there is a sense, to which we return below, in which the dynamic of constitutional reform feeds itself and so doing creates disequilibrium, whetting an appetite that cannot be fully or finally satisfied.

What, lastly, of an unsettled constitution as the harbinger of a new Constitutional settlement? This could be seen either in terms of a formal documentary settlement, or as something more informal - more in keeping with the unwritten tradition, but still nevertheless the *de facto* crystallisation of a new constitutional order. Some saw the Blair New Labour reforms as producing such a new constitutional settlement.⁸⁴ Quite apart from subsequent evidence which suggested otherwise - a distinctly unsettled settlement - closer examination of the Blair program, even as it happened, reveals a somewhat disparate collection of differently motivated projects opportunistically brought together under the convenience of a common constitutional cover. What is more, some of the programme priorities and tendencies of the Blair government, including successive anti-terrorist measures and lukewarm support for regional devolution in England or for

⁷⁹ See most recently, Silk Commission *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* March 2014; <http://commissionondevolutioninwales.independent.gov.uk/files/2014/03/Empowerment-Responsibility-Legislative-Powers-to-strengthen-Wales.pdf>

⁸⁰ Commission on Scottish Devolution *Serving Scotland Better: Scotland and the United Kingdom in the 21st century* Final Report, June 2009 <http://www.commissiononscottishdevolution.org.uk/uploads/2009-06-12-csd-final-report-2009fbookmarked.pdf>

⁸¹ Ss 9-11 and Part 3.

⁸² "Editors' Introduction" *op cit* note 25, 3-5.

⁸³ *op. cit.* note 7, at 345

⁸⁴ See e.g. R. Hazell (ed) *Constitutional Futures: A history of the next ten years* (Oxford: OUP, 1999) 1, critiqued in C. Turpin and A. Tomkins, *British Government and the Constitution* (Cambridge : CUP, 6th ed. 2007) 24.

restoration of the long eroded powers of local government, seemed to run against the rights-respecting and decentralising grain of the wider constitutional aspiration.⁸⁵

Perhaps, though, this is an unrealistic standard to set. There is an undeniable sense in which many major Constitutional settlements involve an element of strategic bundling. They embrace an aggregation of concerns as much as a holistic diagnosis and a rounded vision - an appeal to the better collective nature of the political community and its authors as much as a consistent practical commitment. And so we should be careful not to be too harsh in our assessment of the recent British record.

However, normally a Constitutional settlement is not just a rhetorical construction, but also involves a distinctive procedural discipline. There is usually a special process - Convention, Commission or the like - of bringing the measures together for common consideration and treating them with greater solemnity, of seeking their coherence and demanding their rounded reflection. It is precisely this discipline that helps transform the piecemeal into the holistic, and that encourages the better nature of overall long-sighted reflection alongside the inevitability of discrete issue-by-issue contestation. And it is this discipline, or its absence, that inevitably brings us back to the second sense of a Constitutional settlement; namely the production of a canonical written constitution.

Yet the contemporary British history of formal constitution-writing, as we have remarked, is one of occasional initiative, but with little by way of serious political momentum. Partly, this is because of the legacy of the informal settled constitution. There is reluctance, even on the part of those who acknowledge the importance of an ongoing reform agenda, to give up either on a tradition of symbolic distinctiveness or on a measure of normative flexibility, which, as already noted, can be argued to be at an even greater premium in an age of constitutional flux. That reluctance often translates as ambivalence about the value of a constitutional settlement, an attitude tellingly manifest in the tendency to link the idea of constitution-making to the idea of codification.⁸⁶ This suggests a halfway house in which any new arrangement accrues the symbolic dividend and systematizing benefit of a visible settlement, but in so doing precisely sets itself *against* any constitutive project of detraditionalization and of root and branch renewal. But the other part of the story of the absence of a constitutional settlement from the political agenda has to do, more basically, with the profound difficulties of reaching a new joined-up agreement in today's

⁸⁵ See Turpin and Tomkins. *Ibid* ch.1

⁸⁶ See e.g Jowell and Oliver, "Editors' Introduction" *op cit* note 25, 5-6; see also Political and Constitutional Reform Committee of the House of Commons, whose recent inquiry into the prospect of a Constitutional Convention of the UK (*op. cit.* note 74) was carried out simultaneously with an ongoing inquiry into constitutional codification; *Mapping the path to codifying - or not codifying - the UK's Constitution* <http://www.parliament.uk/business/committees/committees-a-z/commons-select/political-and-constitutional-reform-committee/inquiries/parliament-2010/mapping-the-path-to-codifying---or-not-codifying---the-uks-constitution/>

Britain. Even where a new constitutional settlement may be favoured for its popular credentials and transformative potential, the prospects of a serious initiative remain palpably distant for its supporters.⁸⁷ Not only would the substantive agenda of a new constitutional agenda be formidably open-ended - that, after all, is the challenge of any new Constitution, and one that is often overcome by the urgency of the moment or the rare propitiousness of the circumstances. In addition, however, as we develop below, in what we might understand as a *paradox of initiative*, the very factors that might concentrate minds most urgently on a new settlement at the level of the fundamental law of the state also serve, in the British case, to militate against the generation of the common political will necessary to deliver that unprecedented result.

5. Constitutional Unsettlement

The idea of a constitutional unsettlement emerges from a sense that each of the alternatives for the British constitution - the settled constitution, the temporarily unsettled constitution, and the new Constitutional settlement, are either unavailable or increasingly remote in prospect. A constitutional unsettlement, then, is a combination of certain deep-lying, historically informed structural features of the constitution which contribute to and flow from the closing off of these other options as viable alternatives, together with the mindset this structural background tends to encourage. Let us try to specify the different aspects of this.

To begin with, the combination of doctrinal, political, cultural and external changes producing the dynamic of accelerating constitutional movement both reflects and reinforces *uncertainty and disputation over the sources of constitutional change*. The sovereignty of parliament, challenged, modified but far from overturned, continues to provide the touchstone of constitutional change. It supplies the more or less contentious baseline to which all efforts of constitutional reform must refer, whether they seek to endorse the doctrine in its traditional form, to modify it to their ends, or to replace or supplement it. This can lead to a kind of gridlock between the forces of conservation and change, and to a coding of debate in unproductively, and potentially destructively oppositional terms. On the one hand, debates over the legal versus the political constitution, over common law versus statute, over courts versus legislature, over a "bipolar sovereignty"⁸⁸ of judges and Parliament versus the singular authority of the latter, over a gradation of "constitutional statutes"⁸⁹

⁸⁷ See e.g. V. Bogdanor *op. cit.* note 3, ch.9.

⁸⁸ S. Sedley. "Human Rights: A Twenty-First Century Agenda [1995] *Public Law* 386. 389.

⁸⁹ See e.g., *Thoburn v. Sunderland City Council* [2003] Q.B. 151; *R (Jackson) v Attorney General*, [2006 1 AC 262](#) (UKHL 2006); *AXA General Insurance v Lord Advocate* [2011] UKSC 46; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

and non-constitutional statutes versus a flatland of ordinary laws, reflect continuing “congestion”⁹⁰ at the centre of our constitutional order. Because the “commanding heights”⁹¹ of our constitution are still defined in terms of a narrow institutional unity, the access routes to these heights are constricted and hotly contested between the two branches of government - legislature and judiciary - who are themselves interested parties in the debate, with neither branch either willing or required to concede the final word. On the other hand, where a more direct challenge to the constitutional order arises, as in the case of Irish or, now, albeit in a very different climate, Scottish nationalism, the fact that this must be addressed within the frame of parliamentary sovereignty, rather than through a broader process of constitutional reform that does not lie within the gift of the government and legislative majority of the day, can lead to forms of polarization that do not aid considered deliberation. The doctrine of parliamentary sovereignty is prone, in these circumstances, to become part of the problem, or at least to be viewed as such – staunchly defended or implicitly relied upon on the one hand, and treated as part of the very pathology to be resisted or overturned on the other⁹² – rather than, as might be the case of a special legislative pathway for constitutional reform if such were available, as a procedure for brokering the reconciliation of different visions.

In the second place, *uncertainty, disputation and disorderly diversity as regards the instruments of constitutional policy* follows from this more fundamental narrowness of the axis of constitutional authority and change. Just because we have no canonical process for making or entrenching or otherwise embedding constitutional reform, a number of surrogate institutions and mechanisms emerge to fill the vacuum. Various Parliamentary Committees, for example, have been projected or have projected themselves as agents or stewards of the process of constitutional change, from the House of Lords Constitution Committee to the House of Commons Political and Constitutional

⁹⁰ Walker, *op. cit.* note 65, 31

⁹¹ *Ibid* 32.

⁹² In the early stages of the current Scottish referendum debate, for example, a stand-off was threatened between one position, backed by the Unionist parties, holding that only the UK Parliament had the legislative authority to grant a referendum on independence, and another, supported from a nationalist perspective, claiming that the Scottish Parliament and government, as representative of the ‘sovereign’ right or aspiration of the Scottish people, possessed a self-standing competence to call a referendum. For the competing governmental views, see, Scottish Government, *Your Scotland, Your Referendum* (Edinburgh, 2012); *Scotland’s Constitutional Future* Cm 8203 (January 2012); see also report of the Scottish Affairs Select Committee *Making the Process Legal* (2nd report of 2012-13, HC 542); for the accompanying academic debate, see e.g., <http://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/> <http://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/>

The matter was formally resolved by the signing of the Edinburgh Agreement (October 2012), which anticipated the making of a joint agreement under s30 of the Scotland Act 1998; see Scotland Act 1998 (Modification of Schedule 5) Order 2013, S.I. 2013 No. 242.

Reform Committee and the Joint Committee on Human Rights.⁹³ So too, various commissions of inquiry of quite different pedigree perform a similar role as agents of change. The Calman Commission for Scotland and the Silk Commission for Wales, for instance, have worked to very similar remits in recent years, and been similarly influential in their respective devolution debates. However, whereas the Silk Commission was established by the British government, the Calman Commission was the creature of the Scottish Parliament. The referendum has also emerged as a key surrogate instrument of constitutional reform.⁹⁴ It has done so in areas as diverse as devolution in Scotland and Wales, sovereignty in Northern Ireland, Scottish independence, regional devolution in England, and European Union membership, supplying an *ad hoc* mechanism to authorize constitutional change where the normal pathways are deemed to lack the requisite constitutional gravitas or are of disputed legitimacy. Other hybrid instruments of constitutional policy include the new range of concordats governing relations between the parts and the centre of the UK constitutional order in the absence of a formal federal system,⁹⁵ and the Memorandum of Agreement between Scottish and UK governments – the so-called ‘Edinburgh Agreement’ – to develop a clear legislative and administrative pathway to the independence referendum. This operated as a kind of ‘internal’ international agreement – a form of “para-diplomacy”⁹⁶ reflecting, once again, the intense intersection of considerations of internal and external sovereignty in the present constitutional debate.

Of course, every constitutional order will have a variety of instruments and mechanisms of constitutional policy, not all of which will be mandated by a canonical constitutional document. However, what is distinctive about the UK case is the absence of any systematic and broadly authoritative machinery of constitutional expression and reform. The surrogates themselves – the parliamentary committees, the expert commissions, the referenda etc., often reflect and amplify the very difficulties of considered and authoritative constitutional resolution they are deployed to address. They are often of uncertain authority, either due to their unclear or doubtful pedigree or on account of concerns over their broader fitness for purpose. Often, moreover, disagreement over sources – who gets to decide – shades into disagreement over tools – what means should be used – as, for example, in the highly topical question of the appropriate procedure of succession of an

⁹³ See e.g. M. Hunt, “The Joint Committee on Human Rights” (223-250); A Le Sueur and J. Simson Caird “The House of Lords Select Committee on the Constitution” (281-308), both in A. Horne, G. Drewry and D. Oliver (eds) *Parliament and the Law* (Oxford: Hart, 2013)

⁹⁴ See in particular S. Tierney *Constitutional Referendums: A Theory of Republican Deliberation* (Oxford: OUP, 2012)

⁹⁵ See e.g. R. Rawlings “Concordats of the constitution” (2000) 116 *Law Quarterly Review*, 257-286.

⁹⁶ See e.g., F. Aldecoa and M. Keating (eds) *Paradiplomacy in Action: The Foreign Relations of Subnational Governments*. (London: Frank Cass, 1999)

independent Scotland to the EU.⁹⁷ What we see in the context of our emerging constitutional unsettlement is the frequent recurrence of attempts to find the appropriate and effective legal register in which to address new constitutional problems whose very novelty tends to expose the inadequacy or inappropriateness of the received way of dealing with these things. Often we are looking for short-cuts or place-fillers in the absence of designed-for-purpose mechanisms, or we are looking at attempts to achieve some kind of symbolic solemnity of process in the absence of an agreed instrument of authority.⁹⁸ In any case, as with sources, this encourages a continuing disputation and accompanying meta-conversation about constitutional fitness for purpose, but one where by definition there is no authoritative method to resolve or even to hold the debate.

In the third place, as already indicated, *the kind of canonical constitutional settlement that might address and resolve many of these problems of authority is unavailable for some the very reasons that it is most needed.* Partly, this is about the symbolic link between constitutional integrity and polity identity. Constitutions, as have already observed, perform many normative functions, but they also perform an expressive function, affirming the integrity of the polity to which they refer.⁹⁹ The champions of Scottish independence, or of an all-Irish state, have little or no interest in a settlement that would lock them into the United Kingdom, even if it were to provide potentially more authoritative and more reliable constitutional methods of negotiating difference and guaranteeing equality of rights between different national communities within the state. Similarly, those most acutely concerned about the encroachment of the European Union into traditional areas of national sovereignty will have little interest in a pan-European constitutional solution, even if it were to supply red lines that protects national competence, since such a solution would also likely cement British membership and undergird the long term authority of the European Union. Partly, too, the paradox of initiative is also a matter of attention deficit and the lack of common feeling that betrays. It has been remarked in the context of the geographical division of the British state that different constitutional agendas at the metropolitan centre and in the minority nations are not only about overt conflict, but are as much a matter of distinct priorities and an attendant mutual indifference and disregard.¹⁰⁰ Lack of concern to put and resolve things in common, then,

⁹⁷ Compare HM Government (2013), *Scotland Analysis: Devolution and the Implications of Independence*, Cm 8554, with Scottish Government (2013), *Scotland in the European Union*.

⁹⁸ See e.g. the proposal in Gordon Brown's *Governance of Britain* Green Paper (Cm 7170m 2007, para 29) to ask the government to ask Parliament to declare, develop and formalize a constitutional convention with regard to the question of Parliamentary approval for the deployment of armed forces abroad; on the difficulties of manufacturing conventions in this way, see A. McHarg "Reforming the United Kingdom Constitutional Law, Convention, Soft Law" (2008) 71 *Modern Law Review* 853-877.

⁹⁹ Grimm *op. cit.* note 12.

¹⁰⁰ See A. McHarg, "A Tale of Two Constitutions" Scottish Constitutional Futures Forum Blog, December 2013, <http://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/2747/Aileen-McHarg-A-Tale-of-Two-Constitutions.aspx>. See also references at note 7 above.

as much as sharply distinct political identities, militates against the kind of joined up thinking which would address questions of disputed authority in a holistic manner.

In the fourth place, *uncertainty about the sustainability of the constitutional unsettlement becomes unavoidable*. The Scottish question is reaching a defining moment. The future of Britain in the EU is more precarious than at any time since we joined in 1973, or at least since the referendum of 1975, just at the point when the future of the EU itself has never looked less predictable and more sharply polarised, with fiscal Union today a more likely option than ever, but no more so than the loosening of the Union into a graduated arrangement of core and periphery. Other constitutional questions may not be so momentous, but are nevertheless fluid and uncertainly poised. Welsh devolution forges ahead, seemingly encouraged by the example and educated along the pathway of its Scottish near neighbour. The Irish settlement remains an often tenuous compromise between starker alternatives. The possibility of a British Bill of Rights, and a loosening of bonds with the ECHR and its Strasbourg Court is more tangible than ever, just at the point when the EU is about to become a member of the ECHR.¹⁰¹ What is more, the switch from uncertain to critical – from amber to red - can happen very quickly, and very unpredictably, in the multipolar constitutional unsettlement. Only five years ago, for example, but just before the Euro crisis, Antony King could write, with little fear of contradiction from constitutional players and observers, that there was no foreseeable threat from the EU quarter to the integrity of the British constitution.¹⁰²

Fifth and finally, it follows that in our state of constitutional unsettlement *there is little option but to accept its unpredictable trajectory and its fluid and fragile integrity*. This does not mean, of course, that particular outcomes are not and should not be the focus of struggle, or even that certain key constitutional struggles may not be resolved beyond the short-term. It does mean, however, that there are so many sites of uncertainty and fluctuating movements, and so interconnected are these, that the overall profile of the constitutional unsettlement is likely to remain fluid and changeable. Though there are likely to be key actors who do not accept this diagnosis, or at least who claim not to do so in pursuit of the political prizes associated with the promise of more certain outcomes,¹⁰³ all the options in lieu of a constitutional unsettlement seem to be exhausted or absent from the horizon – to belong either to a fast-receding past or to a remote future. As we have seen,

¹⁰¹ Treaty on European Union, Art. 6(2).

¹⁰² *Op. cit.*, note 8, 353

¹⁰³ Certainty and security have been key words in the Scottish constitutional debate. On the false promise of constitutional certainty, see N. Walker “The Receding Tape” Scottish Constitutional Futures Forum Blog, September 2013;

<http://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/2236/Neil-Walker-The-Receding-Tape.aspx>

and more generally, M. Keating *Rescaling the European state: the making of territory and the rise of the meso* (Oxford: OUP, 2013).

after the unraveling of the previous regime under Blair's reform agenda, there can be no easy return to the settled constitution. Equally, the new unsettled and uncertainly dispersed constitution cannot be controlled and cabined from a concentrated centre, as tends to be assumed in the dynamic equilibrium model of the unsettled constitution. Nor, as we have seen, can the unsettled constitution plausibly be fast forwarded to a new state of Constitutional settlement where a definitive line may be drawn under the age of unsettlement.

6. Living with constitutional unsettlement

If our constitutional unsettlement is here to stay for the unforeseeable future, what, if any, positives may be set against the concerns listed above? In the space remaining, I can do no more than sketch a basic outline of what these might be.

First, there are certain virtues in the pluralism that the state of constitutional unsettlement crystallizes. The multipolar constitution, balanced, however precariously between London, Edinburgh, Belfast, Cardiff, Brussels and Strasbourg, necessarily involves some recognition of difference, some accommodation of diversity. The key balance may be one of power and of strategy, rather than the kind of normative weighing-up we increasingly associate with a certain type of legal reasoning - in particular judicial reasoning in a certain kind of integrated constitutional arrangement,¹⁰⁴ but there are also some advantages in this starker form of pluralism. Political considerations tend to predominate. Indeed, as we have seen in the Edinburgh Agreement, and in the turn to referenda over both Europe and Scotland, we find an explicit endeavour to keep the constitution out of the courts and within the political system. This makes for a process in which democratic considerations, admittedly far from perfectly suited to circumstances where the very identity of the demos is a key prior question, assume priority. It is also a process that forces and keeps differences out in the open. There is no camouflaging of the vital choices to be made, no mediation through judicial institutions whose authority over such palpably political questions may be increasingly subject to question.¹⁰⁵

Secondly, there is also a certain virtue in the retention of constitutional fluidity. Above we argued that the lack of a canonical authority lies at the heart of the uncertainty and contentiousness over both constitutional sources and constitutional instruments in our state of constitutional

¹⁰⁴ See e.g. A. Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge: CUP, 2012)

¹⁰⁵ See, for example, C. MacAmhlaigh, "Does Germany Need a Political Questions Doctrine?" in critique of the recent German constitutional court decision (<https://www.bundesverfassungsgericht.de/pressemitteilungen/bvg14-009en.html> February 7th 2014) on the legality of the ECB's bond buying practices. This, of course, is but the latest in a famous line of decisions in which the German court has accepted jurisdiction in key struggles over the political course of the EU in its role as guardian of the German Basic Law.

<http://eutopialaw.com/2014/02/21/does-germany-need-a-political-questions-doctrine/>

unsettlement, and we cautioned against an attitude that responded to this with a complacent re-affirmation of the genius of our flexible tradition. Yet, given that an absence of canonical authority accurately reflects the contemporary state of play within our wider political culture, better a candid expression of this than an imposed orthodoxy. If we take, again, the case of the Scottish independence referendum, while parliamentary sovereignty may have appeared to give a bare authority to the centre to impose its will, it also allowed the centre discretion, which was duly utilised, to come to a negotiated settlement.¹⁰⁶ This surely compares favourably with a situation, such as that of Catalonia, where the Spanish state and Constitution, confronted with a claim to autonomy subject to similar levels of popular endorsement and of similar legitimacy to that of Scotland, simply does not countenance a legally competent process of secession, or any mechanism, such as a referendum, that is conducive to that process.¹⁰⁷ Indeed, as the increasingly fluent pattern, and sometimes turbulent course, of multi-level constitutionalism in the member states of the EU more generally demonstrate, the UK is far from alone in tending towards a condition of constitutional unsettlement. In these circumstances, a constitutional settlement that enshrines an agreement that no longer holds in political practice, or gives power to a non-political institution such as a court in circumstances that have become more politically volatile, can find that its authority system operates as a straitjacket, and so as an impediment rather than a guide to a balanced resolution.

Thirdly, if the constitutional unsettlement is multipolar in nature, as in the British case, then even the key threshold questions – Scottish independence or not, EU membership or not, are never black and white, but matters of degree. Legal authority in an interconnected transnational world comes not in organically compact blocks but is salami-sliced across a range of polities.¹⁰⁸ This has a double effect. It means, objectively, that constitutional statuses such as independence, though still profoundly important, are less categorical than once they were; independent Scotland, for example, would still seek to be in the European Union, and in a whole raft of other ‘British’ and transnational arrangements.¹⁰⁹ Independence would come with a significant, and unsettled, residue of interdependence, just as continued interdependence allows a considerable, and unsettled element of independence.¹¹⁰ Reinforcing these more fluid possibilities, the division of authority also shifts political expectations. The absence of bright lines encourages more spectral solutions – as we have seen in the early mooted of a third ‘devo max’ option in the current Scottish independence debate, and more pertinently, in a nationalist agenda for independence which aspires to retain significant

¹⁰⁶ see references at note 92.

¹⁰⁷ See *The Economist* December 13th 2013; <http://www.economist.com/blogs/charlemagne/2013/12/catalonia>

¹⁰⁸ See e.g. Walker, *op. cit.* note 66; Keating *op. cit.* note 103

¹⁰⁹ See e.g. Scottish Government *Scotland's Future: Your guide to an Independent Scotland* (2013)

¹¹⁰ Walker *op cit.* note 66

parts of the Union state – social, monarchical and currency in particular. The abrupt discontinuities that supply the dark side of unsettlement, therefore, are situated much more on a continuum than may appear at first glance.

Finally, the state of constitutional unsettlement stands in an interesting relationship to questions of identity politics. Historically, constitutionalism has had a complex but largely singular relationship with various forms of unity. Constitutions, to repeat, are both normative ways of organising the integrity of a polity and expressive means of symbolising the identity of a people. Often they are emphatically both, as they have been in the United States of America, and even when one dimension outweighs the other, they usually remain intricately linked.¹¹¹ Perhaps, however, that intimate link is under threat, together with the more divisive ways in which constitutional symbology has underlined politico-cultural identity. Perhaps the new state of constitutional unsettlement, rather than tracking and reinforcing politico-cultural singularity will come to stress law's role in mediating and accommodating the very absence of such singular relationships. Perhaps, then, our constitutional law will become more an education in the limits and fragile interdependence of political communities, and less a force that seeks to vindicate the underlying unity of any one community. Constitutional unsettlement, if looked squarely in the face, may turn out to be a 'least worst' solution for a world in which constitutional sovereignty, both as an organizing device and as a measure of belonging, is not what it used to be.

¹¹¹ On the multi-faceted complexity of constitutional identity, and its very different development in different contexts, see M. Rosenfeld *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community*. (New York: Routledge, 2010)